

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JEFF POKORNY, LARRY BLENN, and  
KENNETH BUSIERE, on behalf of  
themselves and those similarly  
situated,

Plaintiffs,

v.

QUIXTAR INC., et al.,

Defendants.

No. 07-00201 SC

ORDER GRANTING  
DEFENDANTS' MOTION TO  
STAY PROCEEDINGS  
PENDING APPEAL

**I. INTRODUCTION**

The Court recently denied three motions to dismiss or stay this action and to compel arbitration. See Order Denying Defendants' Motions to Dismiss or Stay and to Compel Compliance with Dispute Resolution Agreement ("Order"), Docket No. 115. Defendants Quixtar, Inc., Britt Worldwide, L.L.C., American Multimedia, Inc., Britt Management, Inc., Bill Britt, Peggy Britt, World Wide Group L.L.C., James Ron Puryear, Jr., and Georgia Lee Puryear (collectively "Defendants") have appealed that Order. See Docket No. 118. Defendants now move to stay this action pending the outcome of the appeal. Docket No. 123 ("Motion"). For the reasons set forth below, the Court GRANTS Defendants' Motion and STAYS this action pending appeal.

## II. DISCUSSION

### A. Legal Standard

Under Section 16(a) of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., an order denying a motion to compel arbitration is immediately appealable. See 9 U.S.C. § 16(a). Such an appeal does not automatically divest this Court of jurisdiction. Britton v. Co-op Banking Group, 916 F.2d 1405, 1411-12 (9th Cir. 1990). However, the district court may, at its discretion, stay the proceedings on the merits while the appellate court considers the question of arbitrability. Id. at 1412. Four factors guide the court's discretion in deciding whether or not to stay the proceedings: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether public interest favors a stay." Winig v. Cingular Wireless LLC, No. C-06-4297 MMC, 2006 U.S. Dist. LEXIS 83116, at \*2 n.1 (N.D. Cal. Nov. 6, 2006) (quoting C.B.S. Employees Fed. Credit Union v. Donaldson, 716 F. Supp. 307, 309 (W.D. Tenn. 1989)). The first element addresses the merits of the appeal, not the merits of subsequent proceedings in the district court, and it is satisfied where the moving party shows that it has raised a "serious legal question" on appeal. Id.

### B. Analysis

All four factors set forth above favor a stay in the present matter. Defendants have raised two serious legal questions on

1 appeal, satisfying the first factor. The first question is the  
2 resolution of an apparent split between this Court's ruling on the  
3 motion to compel arbitration and the rulings of a number of other  
4 state and federal courts.<sup>1</sup> Numerous courts have found Defendants'  
5 ADR agreement enforceable, at least in part, while the Court's  
6 Order here struck down the entire agreement as procedurally and  
7 substantively unconscionable, and therefore unenforceable. Such  
8 conflicting rulings demonstrate that the law is unsettled and  
9 guidance from the appellate court would be beneficial. See, e.g.,  
10 Jones v. Deutsche Bank AG, No. C-04-5357 JW, 2007 U.S. Dist. LEXIS  
11 39094, at \*6-7 (N.D. Cal. May 17, 2007). Similarly, Defendants  
12 argue that the applicability of the holding in Wolsey, Ltd. v.  
13 Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998), is unsettled. The  
14 Court found that Wolsey did not govern, but Defendants have  
15 identified other courts that disagreed, and enforced provisions  
16 requiring non-binding mediation as a precursor to arbitration or  
17 litigation. As this is a controlling issue of law, a stay is  
18 warranted until the appellate court determines whether Wolsey  
19 governs.

20 The second factor also favors staying this action pending the  
21 appeal. Absent a stay, Defendants could spend substantial time

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23 <sup>1</sup>Defendants assert that several other federal courts "reached  
24 exactly the opposite holding." Mot. at 4 n.4. This overstates the  
25 case significantly. With one exception, none of those cases  
26 applied California law, and many did not address the full scope of  
27 legal issues the Plaintiffs presented here in their opposition to  
28 the motions to compel arbitration (i.e., they addressed one  
provision of the agreement, such as arbitrator selection or  
confidentiality, but not all of the challenges Plaintiffs raised).  
Though those courts reached different conclusions, they were not  
faced with identical questions of law.

1 and resources on the litigation, only to have the appellate court  
2 reverse the Order and compel arbitration after the fact. In that  
3 situation, the primary benefits of ADR – speed and economy – would  
4 have been lost. See, e.g., Winig, 2006 U.S. Dist. LEXIS 83116, at  
5 \*6 (citing Alsacom, Inc. v. ITT N. Elec. Co., 727 F.2d 1418, 1422  
6 (9th Cir. 1984)).

7 The third factor also supports a stay. Plaintiffs Pokorny  
8 and Blenn have terminated their relationships with Defendants, and  
9 will not incur any further damages as a result of the delay.  
10 Defendants previously agreed to preserve all evidence, so a stay  
11 pending appeal will not prejudice Plaintiffs' ability to conduct  
12 discovery and prosecute the action should it go forward after the  
13 appeal. Although Plaintiff Busiere brought claims for injunctive  
14 relief in the First Amended Complaint, it is possible that those  
15 claims may be subject to arbitration following the appeal, so it  
16 would still be premature to begin litigating them at this time.<sup>2</sup>

17 Finally, the same benefits of ADR that tip the second factor  
18 in favor of a stay also serve the public interest. The speed and  
19 efficiency of ADR are the foundation for a strong federal policy  
20 favoring arbitration over litigation, which would be contravened  
21 by requiring the parties to litigate while the appeal is pending.  
22 See id. at \*9 (citing Moses H. Cone Mem'l Hospital v. Mercury  
23 Constr. Corp., 460 U.S. 1, 24 (1983)). The fourth factor – the

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25 <sup>2</sup>After Plaintiffs filed the First Amended Complaint, the  
26 parties submitted supplemental briefs addressing whether or not the  
27 newly-added claims for injunctive relief were arbitrable. The  
28 Court did not reach that question because it found the entire ADR  
agreement unenforceable.

1 public interest – therefore also favors a stay.

2  
3 **III. CONCLUSION**

4 For the foregoing reasons, the Court hereby GRANTS  
5 Defendants' Motion and STAYS this action pending appeal.

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7 IT IS SO ORDERED.

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9 Dated: April 17, 2008

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14 UNITED STATES DISTRICT JUDGE  
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